

Robert Hooker
Arizona State Bar No. 003335
Pima County Public Defender
33 North Stone Avenue, 21st Floor
Tucson, Arizona 85701
(520)243-6830

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of :)	
)	No.
AMENDMENT OF RULES)	
32.4(c)(2) AND 32.6(a))	Petition to Amend Rule 32.4(c) and
AND (b) OF THE ARIZONA)	Rule 32.6(a) and (b)
RULES OF CRIMINAL)	Rules of Criminal Procedure
<u>PROCEDURE</u>)	

Robert Hooker, the Pima County Public Defender, petitions this Court pursuant to Rule 28, Rules of the Supreme Court, to amend Rules 32.4(c)(2), and 32.6(a) and (b) of the Arizona Rules of Criminal Procedure, to lengthen the time period before the first due date for the defendant's petition for post-conviction relief and the state's response to the petition for post-conviction relief, and to permit the superior court to grant 30-day extensions of time to the defendant or state upon a showing of good cause rather than extraordinary circumstances. These changes, indicated on Exhibit A attached hereto,¹ are necessary to allow counsel adequate time to investigate and prepare constitutionally adequate pleadings, and to give superior court

¹ In the exhibit deletions are designated by strike outs and additions by all capitals.

the necessary flexibility to ensure that counsel are able to effectively perform their duties.

Petitions for post-conviction relief pursuant to Rule 32 require the defense attorney to review the superior court record and transcripts of proceedings, as well as the state's disclosure to the trial attorney and the trial attorney's investigation file. The current rules provide that the petition and response be filed within sixty days of the appointment of counsel or forty-five days after filing of the petition, and require a showing of extraordinary circumstances before the granting of a second or subsequent extension of time. This petition requests that the initial time be extended to ninety days for both the defense and the state, and that the superior court be given the discretion to grant continuances beyond the first without a showing of extraordinary circumstances. This change is necessary because the defense attorney frequently has to conduct an independent investigation to locate witnesses and physical evidence and to consult with experts and obtain expert opinions. This is especially likely to occur in cases involving newly discovered evidence, *see* Rule 32.1(e), or ineffective assistance of counsel, *see* Rule 32.1(a). Before filing its response, the state must then conduct investigations into the new evidence, obtain its own experts, and, in the case of ineffective assistance claims, interview trial counsel, which can also be

time consuming. Although the defendant's reply requires less time to prepare, sometimes affidavits and other evidence must be obtained to respond to the state's arguments. Furthermore deleting the requirement for extraordinary circumstances from this rule promotes uniformity.

Petitions for post-conviction relief fall into two classes: those arising from trial and those arising from pleas. The problems addressed above occur more often in petitions for post-conviction relief arising from trials, although, on occasion, a plea occurs after substantial litigation, and sometimes even after several days of trial. Furthermore, a petition for post-conviction relief arising from a plea may involve fact-intensive mitigation issues, which often require extensive investigation of a defendant's background and medical and mental health history. Although many petitions for post-conviction relief arising from pleas are quite simple, variation in the complexity of these petitions makes it important that the superior court have discretion to grant extensions of time. The requirement that extraordinary circumstances be shown before a second extension of time can be granted creates uncertainty about whether the superior court has the authority to grant continuances even when a case is especially complex, a file is particularly voluminous and requires months to review or when there is difficulty tracking down an important witness or piece of evidence. For

example, obtaining medical records in order to support a claim that a defendant had an unknown medical condition at the time of sentencing, *see State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989) (post-traumatic stress disorder); *State v. Cooper*, 166 Ariz. 126, 800 P.2d 992 (App. 1990) (HIV), is often very time consuming, but it is outside the control of counsel. Problems such as these might be considered “extraordinary” but in fact occur relatively frequently. If the frequency of an event is a measure of whether the event is extraordinary, it may not be considered extraordinary. It is therefore possible to interpret the rule as written to exclude continuances even in such meritorious circumstances. This has resulted in inconsistent rulings on motions to extend time.

Petitions for post-conviction relief protect important interests. For a pleading defendant they fulfill the right to appeal under the Arizona Constitution. *Montgomery v. Sheldon*, 181 Ariz. 256, 258-60, 889 P.2d 614, 616-18 (1995). They protect all defendants from ineffective assistance of counsel. Increasing the time before the petition and response are required to be filed and giving the superior court discretion to determine when extensions of time after the first should be granted will ensure that the defense and state can adequately address the important issues that are frequently raised in petitions for post-conviction relief.

Of course, delay in filing a petition impacts various interests. Delay in filing a legitimate claim may injure a defendant by requiring him or her to spend a longer time in prison than necessary. Delay can make it more difficult for the superior court to manage its case load. Finally, victims have an interest in a speedy resolution of criminal cases. However, these concerns are better dealt with by the superior court, who can consider the facts of the case, the reasons for delay, and any concerns voiced by the victim, than by the requirements of a rule.

Respectfully submitted this 10th day of January, 2008.

A handwritten signature in cursive script, reading "Michael J. Miller". The signature is written in dark ink and is positioned above a horizontal line.

Robert Hooker, Pima County Public Defender, by
Michael J. Miller, Assistant Public Defender

EXHIBIT A

Rule 32.4. Commencement of proceedings

c. Appointment of Counsel.

(2) Rule 32 of-right and non-capital cases. Upon the filing of a timely or first notice in a Rule 32 proceeding, the presiding judge, or his or her designee, shall appoint counsel for the defendant within 15 days if requested and the defendant is determined to be indigent. Upon the filing of all other notices in non-capital cases, the appointment of counsel is within the discretion of the presiding judge. In non-capital cases appointed counsel for the defendant shall have ~~sixty~~ NINETY days from the date of appointment to file a petition raising claims under Rule 32.1. On a showing of good cause, a defendant in a non-capital case may be granted a thirty day extensionS within which to file the petition. ~~Additional extensions of thirty days shall be granted only upon a showing of extraordinary circumstances.~~

Rule 32.6. Additional pleadings; summary disposition; amendments

a. Prosecutor's Response. ~~Forty-five~~ NINETY days after the filing of the petition, the state shall file with the court and send to the defendant or counsel for the defendant, a response. Affidavits, records or other evidence available to the state contradicting the allegations of the petition shall be attached to it. On a showing of good cause, the state may be granted a thirty day extensionS to file a response. ~~Additional extensions shall be granted only upon a showing of extraordinary circumstances.~~

b. Defendant's Reply. Within fifteen days after receipt of the response, the defendant may file a reply. ~~Extensions shall be granted only upon a showing of extraordinary circumstances.~~